TITLE BY ADVERSE POSSESSION

I

POLICY AND OPERATION OF THE STATUTES OF LIMITATION

TITLE by adverse possession sounds, at first blush, like title by theft or robbery, a primitive method of acquiring land without paying for it. When the novice is told that by the weight of authority not even good faith is a requisite, the doctrine apparently affords an anomalous instance of maturing a wrong into a right contrary to one of the most fundamental axioms of the law.

> "For true it is, that neither fraud nor might
> Can make a title where there wanteth right." [1]

The policy of statutes of limitation is something not always clearly appreciated. Dean Ames, in contrasting prescription in the civil law with adverse possession in our law, remarks: "English lawyers regard not the merit of the possessor, but the demerit of the one out of possession." [2] It has been suggested, on the other hand, that the policy is to reward those using the land in a way beneficial to the community.[3] This takes too much account of the individual case. The statute has not for its object to reward the diligent trespasser for his wrong nor yet to penalize the negligent and dormant owner for sleeping upon his rights; the great purpose is automatically to quiet all titles which are openly and consistently asserted, to provide proof of meritorious titles, and correct errors in conveyancing.[4]

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[1] Quoted in Altham's case, 8 Coke Rep. 153, 77 Engl. reprint, 707.

[2] LECTURES, LEGAL HIST. 197.

[3] Axel Teisen III, AM. BAR ASS'N JOURNAL, 127, April, 1917.

[4] That the policy of the statutes of limitation is the quieting of titles evidenced by possession for the sake of the stability of meritorious titles, see M'Iver *v.* Ragan, 2 Wheat. (U. S.) 25 (1817); Turpin *v.* Brannon, 3 McCord, L. 261 (1825); North Pac. R. Co. *v.* Ely, 25 Wash. 384, 65 Pac. 555 (1901); Louisville & N. R. R. Co. *v.* Smith (Ky.) 125 Ky. 336, 101 S. W. 317 (1907); Humbert *v.* Trinity Church, 24 Wend. (N. Y.) 587, 609 (1840); Cholmondeley *v.* Clinton, 2 J. & W. 139, 155, 189 (1820); Lampman *v.* Van Alstyne, 94 Wis. 417, 69 N. W. 171 (1896); McCann *v.* Welch, 106 Wis. 142, 148, 81 N. W. 996 (1900); 1 HAYES, CONVEYANCING, 223, 269; Dalton *v.* Angus, 6 App. Cas. 740, 818 (1881); J. S. MILL, POL. ECON., Book 2, ch. 2, § 2; 3 So. L. QUART. 224.

"The thing to be looked at is the possession of the defendant,—not the want of possession in the plaintiff. A possession which has continued for a long time without interruption, and which has been accompanied by an uninterrupted claim of ownership, ought to prevail against all the world." [5]

Although in general a tortious act can never be the foundation of a legal or equitable title, yet if the exercise of apparent ownership is made conclusive evidence of title, this wholesale method necessarily establishes and quiets the bad along with the good. The trespasser benefits, the true owner suffers, for the repose of meritorious titles generally. As Sir Frederick Pollock puts it, "It is better to favor some unjust than to vex many just occupiers."

It is one thing to have the rightful ownership and just title to land; it is another thing to have the proof of that right which can be laid before a purchaser or before a jury. Suppose a landowner is ejected from his land and seeks to be reinstated. The deed under which plaintiff acquired title, without evidence of possession by the grantor of the premises conveyed, is not even *prima facie* proof of title such as to warrant recovery in ejectment. Nor is a connected chain of deeds, which does not reach back to the Government or to some grantor in possession, sufficient, unless it reaches back to some common source of title, or to some source acknowledged to be genuine and valid, or unless there is some estoppel to deny title.[6] The proof of a paper title sufficient to make out a *prima facie* right to possession of land may, therefore, be exceedingly difficult. It involves proving the signature and delivery of every deed; the corporate existence of every corporation in the chain of title; the execution of all powers of attorney; all the statutory notices and formalities in execution, tax and probate sales; all the descents and probate proceedings; in short, every legal step of the transfer of the title, voluntary and involuntary, simple and complex, from a recognized source down must be shown by proper evidence. In order to give adequate protection to other titles, it has been found necessary to recognize possession as title.[7] It is therefore enough that a plaintiff in ejectment, or that his ancestor

[5] LANGDELL, EQUITY PL., § 121.

[6] Terhune *v.* Porter, 212 Ill. 595, 72 N. E. 820 (1904); Krause *v.* Nolte, 217 Ill. 298, 75 N. E. 362 (1905); Cottrell *v.* Pickering, 32 Utah, 62, 88 Pac. 696 (1907).

[7] People *v.* Inman, 197 N. Y. 200, 206, 90 N. E. 438 (1910).

or one of his grantors, was in possession and that this prior possession is vested in the plaintiff by a regular devolution of title. A mere trespasser cannot set up an outstanding title in a third person as a defense where he does not claim under it.[8]

Upon every sale or mortgage of land it is necessary that the evidence of the title be critically examined. For what period and from what source should the title be deduced? The conveyancer in the United States usually looks for a record title going back to a patent from the United States, the state, or some other government for a clear root of title. In England, evidence of the original royal feoffments or gifts of former centuries was long since lost. The proprietor must go back to the earliest possessor or occupant who can be proved to have held seisin in fee. Except for government grant, possession is thus the ultimate root of all titles. Title deeds are nothing but the history or evidence of the transfer of rights arising from possession, reaching back perhaps to "that mailed marauder, that royal robber," that great adverse possessor, — William the Conqueror. "Every title to land has its root in seisin; the title which has its root in the oldest seisin is the best title." [9] With the help of statutes of limitation, however, it is now ordinarily sufficient for the English conveyancer to go back forty years for a root of title.

It may be instructive to sketch the history of the statutes by which limitations were placed on ancient seisin as a source of title. The only limitation on a writ of right to recover seisin at common law was lack of evidence. Several early statutes of limitation were passed, of which the Statute of Westminster I, 3 Edward I, c. 39 (1275), is typical. This statute did not purport expressly to bar any remedy or pass any title but merely placed a fixed limit back of which a suitor in a real action could not go for a source of title. It provided that in conveying (tracing) a descent in a writ of right, none shall presume to declare of the seisin of his ancestor further or beyond the beginning of the reign of King Richard I (1189). In other real actions the demandant could not go back so far. The effect, therefore, was that a more recent seisin, though tortious, became a paramount source of title.

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[8] Casey *v.* Kimmel, 181 Ill. 154, 54 N. E. 905 (1899); Burns *v.* Curran, 275 Ill. 448, 451, 114 N. E. 166 (1916).

[9] 2 POLLOCK & MAITLAND, HIST. ENGL. LAW, 46. See Pollock's ed., MAINE, ANCIENT LAW, ch. 8, 267, 295, 314.

The Statute of 32 Henry VIII, c. 2, § 3, limited real actions by providing that if the claimant rested his title on the ground of former seisin by himself, he was limited to a seisin within thirty years before the *teste* or date of the original writ, as regards both droitural and possessory actions; if on the ground of a seisin by his ancestor, to a seisin within fifty years as regards possessory actions, and within sixty years as regards droitural actions.[10] The demandant in a writ of right must allege and prove seisin in his ancestor within sixty years. Hence seisin that could be traced back sixty years became a good root of title.[11] This was for the reason that no older seisin which had been lost could be resorted to.[12]

Coke says, in his note to Littleton,[13]

"Limitation, as it is taken in law, is a certaine time prescribed by statute, within which the demandant in the action must prove himselfe or some of his ancestors to be seised."

The limitation of 32 Henry VIII is wholly referable to seisin, the statute requiring a seisin within a certain time according to the nature of the writ. The limitation is dated from the seisin, not from the disseisin. The operation of the older statutes is thus not to bar the action, but to bar the source of title or right to which the more recent tortious seisin could be made to yield.

The Statute 21 Jac. I, c. 16 (1623), adopts the modern method of limiting the right of entry, and so the action of ejectment, to within twenty years next after the right of entry accrues. The right of entry does not accrue until some one initiates an adverse possession.[14] The effect of limiting all right of action to recover possession is much the same as that of expressly limiting seisin as a source of title; possession exercised continuously and adversely for a certain time becomes a source of title superior in ejectment to any title derived from an older possession. The Statute of 21 James I, c. 16 (1623), however, did no more than bar or take away the right of entry and ejectment after twenty years, but left open

[10] 1 SPENCE, EQ. JUR. 255; 2 P. & M. HIST. ENG. LAW, 81.

[11] 3 BLACK. COMM., 189, 196, 197; Dumsday *v.* Hughes, 3 Bing. N. C. 439, 452 (1837).

[12] 1 HAYES, CONVEYANCING, 232.

[13] COKE ON LITT., § 170, note 115 *a*.

[14] Agency Co. *v.* Short, 13 A. C. 793 (1888); Norton *v.* Frederick, 107 Minn. 36, 119 N. W. 492 (1909).

the real action by writ of right for forty years more. Consequently it was held in England that the right of entry and the remedy by ejectment, might be barred, but that the "mere right" itself was left outstanding.[15] To remedy this the Statute 3 & 4 William IV, c. 27 (1833), was enacted, which not only bars the remedy of ejectment but expressly abolishes real actions and extinguishes the former title after twenty years.[16] By the Real Property Limitation Act of 1874[17] the period of limitation is reduced to twelve years from the time the right of action first accrued.

American statutes quite commonly follow the parent statute of James I. Illinois, for example, enacts:[18]

"That no person shall commence an action for the recovery of lands, nor make an entry thereon, unless within twenty years (1) after the right to bring such action or make such entry first accrued, or (2) within twenty years after he or those from, by, or under whom he claims, have been seized or possessed of the premises."

Since the owner is deemed to be seised or possessed unless there is another in adverse possession, actual or constructive, clauses one (1) and two (2) apparently come to exactly the same thing. The owner's mere absence from the land does not disable him from bringing an action against an intruder. The second clause as to seisin or possession is apparently an interesting relic of the provisions of the older type of statutes.[19]

The form of statutes of limitation varies; in some of them there are provisions expressly extinguishing the right or title of the former owner; most of them in terms merely bar the remedy by ejectment; but it is the almost invariable rule that the effect of the statute is not only to bar the remedy of ejectment, but also to take away all other remedy, right, and title of the former owner.[20] It is well to

[15] Trustees of Dundee Harbor *v.* Dougall, 1 MacQueen, H. L. Cas. 317 (1852); 3 CRUISE, DIGEST REAL PROP. 430, 436, 447.

[16] See 10 LAW MAGAZINE, or QUART. REV. OF JURISP. 357 (1833).

[17] 37 & 38 Vict. c. 57.

[18] HURD'S ILL. Rev. Stat. (1917) ch. 83, § 1.

[19] Agency Co. *v.* Short, 13 A. C. 793 (1888). See 5 CAL. L. REV. 429; People's Water Co. *v.* Boromeo, 31 Cal. App. 270, 160 Pac. 574 (1916). See also MICH. REV. STAT. (1838) 573, 574, § 1. In Riopelle *v.* Gilman, 23 Mich. 33 (1871), it is held to produce a different result as to the necessity of privity between successive holders. See note 102, *infra*.

[20] United States *v.* Chandler, 209 U. S. 447, 450 (1908); Campbell *v.* Holt, 115 U. S. 620 (1885); Baker *v.* Oakwood, 123 N. Y. 16, 25, 25 N. E. 312 (1890).

notice that this result does not follow necessarily from the statute alone, but arises from the joint operation of the statute and the common law. If a person has a right and several remedies, the bar of one remedy is not the discharge of all the others.[21]

Under American statutes, as under the Statute of James I, there may be some remedies which are not expressly affected by the terms of the statute. But when the statute extinguishes the remedy in ejectment to recover possession, the common law and also equity say that the possession shall not be questioned by the former owner in any other manner, either by self-help, by action of trespass, or by a bill in equity. The earlier statutes of limitation did not mention bills in equity as subject to the bar; but nevertheless they were followed in equity as well as at law on the principle of analogy, and on the principle that where a thing is forbidden by law in one form it shall not be done in another.[22] The judicature by its own rulings has thus imposed limitations, guiding itself by the policy of the statute to quiet the possessory title.

As the Wisconsin Supreme Court has pointed out,[23] it would be a strange anomaly to hold that the law which bars the owner from recovering possession or the use of the land itself, after he has acquiesced in a usurped ownership by another for twenty years, should yet leave him at liberty to assert title in other ways as by action of trespass for mesne profits, by extra-judicial re-entry or by suit in equity to quiet title, for partition or for an accounting. It seems a necessary consequence of the policy underlying the limitation acts that one should be considered to have no right or title when the most essential incident or legal consequence of title, the right to recover possession, is barred. Hopeless confusion would result from the recognition of any such anomalous titles, without right of possession, surviving the statute. The maxim that where there is a right there is a remedy may be turned about *e converso*, so that where there is no remedy there is no right. The only cloud on the possessor's title is the true owner's right to recover possession

[21] Hunt *v.* Burn, 2 Salk. 421, 422 (1702).

[22] Humbert *v.* Trinity Church, 24 Wend. (N. Y.) 587 (1840); Elmendorf *v.* Taylor, 10 Wheat. (U. S.) 152, 174 (1825); Chapin *v.* Freeland, 142 Mass. 383, 8 N. E. 128 (1886); Smith *v.* Clark, 248 Ill. 255, 258, 93 N. E. 727 (1911); Wood *v.* Mich., etc. R. Co., 90 Mich. 212, 51 N. W. 363 (1892); Cholmondeley *v.* Clinton, 2 J. & W. 139, 155 (1820); *Re* Jolly, [1900] 2 Ch. 616.

[23] Steinberg *v.* Salzman, 139 Wis. 118, 124, 120 N. W. 1008 (1909).

by entry or ejectment, or by some other remedy, and when these remedies are all taken away by the statute or by analogy thereto, the defect in the possessory title becomes cured.

It has indeed been said by some eminent judges that the effect of the statute is "to make a parliamentary conveyance of the land to the person in possession at the last moment when the period has elapsed."[24] As Gibson, C. J., puts it, "The instant of conception is the instant of birth," without any period of gestation or maturing of an inchoate title. The idea seems to be that the statute of limitations is a conveyancer like the Statute of Uses, which, when there is a deed by Doe to the use of Roe and his heirs, "executes the use," and, —

> "Like flash of electricity,
> The land 's transferr'd in fee to Roe,
> Nothing at all remains in Doe." [25]

But there is, in truth, no such transfer of title by the statute of limitations. The direct effect of the statute is negative, to extinguish the right of entry of the ousted owner. The indirect effect is to quiet the title of the possessor. Title is thus established by the joint operation of the statute and the common law. The possession of the adverse holder, although gained by manifest wrong, and although liable to be defeated by entry of the rightful owner, is *per se* a title good as shield or sword, either to hold or to recover possession, as against all others. Even the title of the original owner is affected *ab initio*, by disseisin, although not so much to-day as formerly. His "*right of entry*" should hardly be regarded, as Dean Ames regarded it, as being reduced to a mere *chose in action*. His remedy is limited, however, by the common law to asserting his rights by a direct proceeding to recover possession.[26] The statute operates to relieve the adverse holder from this sole danger of eviction, and, being thus quieted, the once precarious possession

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[24] Per Parke, B., in Doe *v.* Sumner, 14 M. & W. 39 (1845). See also Scott *v.* Nixon, 3 Dr. & War. 388, 405, 407 (1843); Rankin *v.* McMurtry, 24 L. R. Irish, 270, 297, 303 (1889); Graffius *v.* Tottenham, 1 Watts & S. (Pa.) 488, 494; Jordan *v.* Chambers, 226 Pa. 573, 75 Atl. 956 (1910). A paradox of Sugden's, 34 L. QUART. REV. 253 (July, 1918).

[25] CRISP, CONVEYANCER, 3 ed., 107.

[26] But, see Jos. Bingham, "Legal Possession," 13 MICH. L. REV. 535, 561, 623, 624, 629; Bethea *v.* Jeffres, 126 Ark. 194, 189 S. W. 666 (1916); Anderson *v.* Hapler, 34 Ill. 436 (1864). See 69 L. R. A. 762, note.

becomes a firm and indefeasible title even against the former owner as of the date when the disseisin or adverse possession commenced.[27]

Accordingly we must not confound the negative operation of the statute with the positive effect of a conveyance of the title from the true owner to the adverse possessor at the moment the statute has fully run. In *Tichborne* v. *Weir*[28] it is held that when one holds adversely to a lessee for ninety-nine years, the adverse possessor cannot be treated as an assignee so as to render him liable on the covenants of the lease. It is sometimes said, indeed, that the law presumes a conveyance by the true owner on the grounds of public policy when the right of entry is gone.[29] But it is unnecessary to resort to the presumption or fiction of a conveyance.[30] Adverse possession vests the possessor with the complete title as effectually as if there had been a conveyance by the former owner.[31] But the title is independent, not derivative, and "relates back" to the inception of the adverse possession.[32] The adverse possessor does not derive his title from the former owner, but from a new source of title, his own possession. The "investitive fact" is the disseisin and exercise of possession.[33]

It is only in case of incorporeal rights that title is acquired by length of adverse user. Title is not gained by length of adverse possession under the statute, except as against the true owner. In case of rights of way and other easements when acquired by prescription, the adverse user under claim of title is also the "investi-

[27] *Re* Atkinson & Horsell, [1912] 2 Ch. 1; Tichborne *v.* Weir, 67 L. T. 735 (1892); Perry *v.* Clissold [1907] A. C. 73; 1 COM. L. REP. 363. *Cf.* La Salle *v.* Sanitary District, 260 Ill. 423, 429, 430, 103 N. E. 175 (1913). See Bryan *v.* Weems, 29 Ala. 423 (1856); AMES, LECTURES ON LEGAL HIST. 197–205; 3 ANGLO-AMERICAN ESSAYS, 567; LIGHTWOOD, TIME LIMIT ON ACTIONS, 117, 156; BANNING, LIMITATION OF ACTIONS, 84; 1 DART, VENDORS & PURCH. 473; 1 HAYES, INTROD. TO CONV. 268.

[28] 67 L. T. 735 (1892).

[29] Cadwalader *v.* Price, 111 Md. 310, 73 Atl. 694 (1909); Scottish Am. M. Co. *v.* Butler, 99 Miss. 56, 57, 71, 54 So. 666 (1910); Earnest *v.* Little River L. & L. Co., 109 Tenn. 427, 75 S. W. 1122, 1127 (1902).

[30] East Jellico Coal Co. *v.* Hays, 133 Ky. 4, 117 S. W. 307 (1909); Armijo *v.* Armijo, 4 N. Mex. 133, 13 Pac. 92 (1883).

[31] Toltec Ranch Co. *v.* Cook, 191 U. S. 532, 542 (1903).

[32] Field *v.* Peoples, 180 Ill. 376, 383, 54 N. E. 304 (1899); Bellefontaine Co. *v.* Niedringhaus, 181 Ill. 426, 55 N. E. 184 (1899). *Cf.* La Salle *v.* Sanitary District, 260 Ill. 423, 429, 103 N. E. 175 (1913); AMES, LECTURES ON LEGAL HIST. 197; 3 ANGLO-AMERICAN ESSAYS, 567.

[33] Camp *v.* Camp, 5 Conn. 291 (1824); Price *v.* Lyon, 14 Conn. 279, 290 (1841); Coal Creek, etc. Co. *v.* East Tenn. I. & C. Co., 105 Tenn. 563; 59 S. W. 634, 636 (1900).

tive fact." The important difference is that apparently here there is no possessory title to the way either as against the servient owner or against the world, until the right has been asserted for the full prescriptive period; there is no "legally protected possession of an incorporeal thing." [34] Take the case of a way used by A for four years on B's land. Would the claimant and possessor of the quasi-dominant be protected in his use against third persons? Mr. Justice Holmes doubts it.[35]

The inchoate title by prescription, the potentiality of acquiring an easement within less than twenty years, is, however, something which can be transmitted with the quasi-dominant tenement so that the successive periods of user may be tacked where there is privity between the successive claimants.[36] The legislative policy of prescription and adverse possession is the same, — that titles to property should not remain uncertain and in dispute, but that continued *de facto* exercise and assertion of a right should be conclusive evidence of the *de jure* existence of the right.

"The earliest act of user proved, tends to prove a right then existing. . . . Such light evidence gains force by continued repetition, until at the end of twenty years it becomes, unexplained, conclusive evidence of right." [37]

Prescription, therefore, like adverse possession, operates to quiet titles which have been consistently asserted, and the requisites are in general the same.

If we had a scientific system for the registration of titles, adverse possession would be of far less importance. Accordingly we find that title by adverse possession is not recognized under some of the Torrens Acts, although it is under others.[38] But under our crude conveyancing and recording systems this doctrine is indispensable as a protection to just titles. Every title in the country may easily

[34] 2 P. & M. HIST. ENG. LAW, 142; POLLOCK, FIRST BOOK OF JURISPRUDENCE, 184.

[35] COMMON LAW, 241. *Cf.*, however, TERRY, ANGLO-AMERICAN LAW, § 311, 297. See also Greenhalgh *v.* Brindley, [1901] 2 Ch. 324; Lord Battersea *v.* Commissioners, [1895] 2 Ch. 708.

[36] McLean *v.* McRae, 50 N. S. R. 536, 33 D. L. R. 128, 132 (1917).

[37] Wallace *v.* Fletcher, 30 N. H. 434 (1855).

[38] But see "Statute of Limitations and The Land Titles Act," 47 CAN. L. J. 5; J. E. HOGG, AUSTRALIAN TORRENS SYSTEM, 85, 806; LIGHTWOOD, TIME LIMIT ON ACTIONS, 133; HURD'S ILL. REV. STAT. (1917) ch. 30, § 84. J. E. Hogg, "Registration of Title to Land," 28 YALE L. J. 54 (November, 1918).

come to depend for its establishment to a greater or less extent on adverse possession. In spite of our elaborate books of record, possession remains the great source, muniment, and quieter of titles to land.

The extent of title and estate thus acquired, whether for years, for life, or in fee, is measured by the claim of title. "If the party claim only a limited estate and not a fee, the law will not, contrary to his intentions, enlarge it to a fee." Where a title depends upon possession, the estate evidenced by his possession depends upon the claim of title which he makes by his declarations or his acts.[39]

Certain qualifications of the title acquired by adverse possession follow from the fact that it arises from possession. There is an important limitation on the rule that bare possession is title good against all the world except the true owner. American courts hold that a bare possessor of land cannot recover full damages for a permanent injury. In *Winchester* v. *City of Stevens Point*[40] the defendant constructed a high embankment which caused the flooding of plaintiff's lot. The plaintiff recovered in the trial court for the permanent depreciation of her property. She had to rely upon possessory title, as she failed to prove a good paper title owing to the fact that two deeds had only one subscribing witness. It was held that, as in condemnation proceedings, plaintiff must show absolute or complete title and that title will not be presumed for this purpose from evidence of possession under claim of title. Apparently plaintiff must show either (1) a complete chain of title from the Government, or (2) title by adverse possession.[41]

In a recent Illinois case it is held that where title by adverse possession becomes complete after a cause of action for permanent injury to the land from flooding accrues, the plaintiff corporation

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[39] Ricard *v.* Williams, 7 Wheat. (U. S.) 59 (1822); Bond *v.* O'Gara, 177 Mass. 139, 58 N. E. 275 (1900). See Jasperson *v.* Scharnikow, 150 Fed. 571 (1907), 15 L. R. A. (N. S.) 1178 n.

[40] Winchester *v.* City of Stevens Point, 58 Wis. 350, 17 N. W. 3, 547 (1883).

[41] See also the following cases: Waltemeyer *v.* Wisconsin Ry. Co., 71 Iowa, 626, 33 N. W. 140 (1887); Kelly *v.* New York Ry. Co., 81 N. Y. 233 (1880); Frisbee *v.* Marshall, 122 N. C. 760, 765; 30 S. E. 21 (1898); International Ry. Co. *v.* Ragsdale, 67 Texas, 24, 28, 2 S. W. 515 (1886). Compare the case of the bailee suing for the full value of property lost or destroyed. The Winkfield, [1902] P. 42. U. S. Fidelity, etc. Co. *v.* United States 246 Fed. 433 (1917); 31 HARV. L. REV. 1028, 1029.

cannot recover, as it did not have (absolute) title to the land by adverse possession or otherwise at the time the right of action accrued.

"That its title became complete by prescription after the cause of action accrued places it in no different position from what it would have been if it had not been in possession but had acquired title by conveyance after the right of action accrued." [42]

This case may be explained on the theory that the statute of limitations simply quiets that title which the adverse possessor already has by virtue of his possession, and the doctrine of relation does not cure any defects in the possessory title except the former owner's right to recover possession.

The statutory extinguishment of the title of the dispossessed owner of land does not destroy easements or restrictive covenants, and it has been held that persons entitled to the benefit of restrictive covenants may enforce them against the new owner by adverse possession.[43] These burdens and privileges with reference to the land are not incident to the estate of the dispossessed owner, and adverse possession of the land does not destroy them, if there is no adverse user.

The efficiency of the doctrine of adverse possession in quieting title is greatly impaired by reason of two exceptions to the operation of the statute, *viz.*, that of disabilities and that of future estates. It has been proposed by the American Association of Title Men (1913), in order to render land titles simpler and more secure, to reduce the period of limitation on actions to recover land to ten years, and to abolish the saving clauses for persons under disability. If titles were quieted by possession regardless of disabilities, such as absence from the state, infancy, insanity, coverture, or imprisonment, this would add greatly to the security of all titles, and we should then be able to rely on mere lapse of time, coupled with proof of continuity of possession and claim of title, to cure all defects and automatically to quiet titles. Friends or relatives or guardians will ordinarily protect the rights of owners under dis-

[42] La Salle Coal Co. *v.* Sanitary District, 260 Ill. 423, 430, 103 N. E. 175 (1913). See also 27 HARV. L. REV. 496; 20 HARV. L. REV. 563; 13 MICH. L. REV. 562; Perry *v.* Clissold, [1907] A. C. 73.

[43] *In re* Nisbet & Potts' Contract, [1905] 1 Ch. 391; [1906] 1 Ch. 3861, 2 B. R. C. 844, 860.

ability, and individual cases of hardship would be more than balanced by the greater security of all titles.

By the general rule, the statute of limitations on ejectment does not begin to run against a remainderman, or the holder of any other future interest until the preceding estate terminates, and he becomes entitled to immediate possession. This is based on the proposition that the right of action does not accrue until that time, as he has no right of action until he is entitled to possession. It follows that while a life estate is outstanding, no one can initiate a holding adverse to the remainderman.[44]

The consequence is that, although one may hold possession of land for twenty years, claiming to own it absolutely against all the world, and may have color of title and pay taxes thereon, yet this possession will not be adverse to the holder of any future interest, although the claim may be brought home to the remainderman.[45]

By a somewhat daring piece of judicial legislation it has been held in Iowa and Nebraska that, where the statutes give a person out of possession an equitable remedy to quiet title, a remainderman may be barred by adverse possession where he has notice of the adverse holding.[46] It is urged that the purpose of the statute is to provide a way to settle disputed questions of title between those in possession of land and those who claim a future interest. Where an adverse claim of ownership is brought home to the holder of such future interest, his welfare, as well as that of the public in general, is best subserved by requiring that questions of title be settled within the statutory period. Accordingly, ejectment and all other remedies will be barred if the remainderman allows ten years to elapse after his right of action to quiet title accrues and thereafter the adverse possessor can quiet title in himself.[47]

It may be argued that the barring of one remedy, *viz.*, an action to quiet title, should not affect other remedies which have not yet

[44] Mixter *v.* Woodcock, 154 Mass. 535, 28 N. E. 907 (1891); Bohrer *v.* Davis, 94 Neb. 367, 143 N. W. 209, 148 N. W. 320 (1913); Wakefield *v.* Yates, [1916] 1 Ch. 452.

[45] Com. *v.* Clark, 119 Ky. 85, 83 S. W. 100 (1904); Gindrat *v.* W. Ry. Co. (Ala.) 19 L. R. A. 839 (1893), note; Barrett *v.* Stradl, 73 Wis. 385, 395; 41 N. W. 439 (1889); Dawson *v.* Edwards, 189 Ill. 60, 59 N. E. 590 (1901); Cassem *v.* Prindle, 258 Ill. 11, 101 N. E. 241 (1913); but *cf.* Nelson *v.* Davidson, 160 Ill. 254, 43 N. E. 361 (1896).

[46] Criswell *v.* Criswell, 101 Neb. 349, 163 N. W. 302 (1917). See also Marray *v.* Quigley, 119 Iowa, 6, 92 N. W. 869 (1902); Crawford *v.* Meis, 123 Iowa, 610, 99 N. W. 186 (1904).

[47] Holmes *v.* Mason, 80 Neb. 448, 114 N. W. 606 (1908).

accrued.[48] But this is something that the courts have done in limiting equitable actions by analogy to the statute of limitations on ejectment; and if policy demands it, a reciprocal limitation of legal actions by analogy would seem equally justifiable. Opinions may differ as to the justice of such extension of the doctrine of adverse possession, but it would have the beneficent effect of bringing up for settlement disputed questions of title before they become stale, and would obviate one of the most serious defects in this automatic method of quieting titles against possible adverse claims which now arises from our undue tenderness towards the holders of future interests.

II

Privity and Tacking Between Successive Holders

It is the almost universal rule of law as laid down by decisions in this country that "privity of estate" is necessary between successive adverse holders to authorize "tacking" their several possessions together.[49] The several occupancies must be so connected that each occupant can go back to the original entry or holding as a source of title. The successive occupants must claim through and under their predecessors and not independently to make a continuous holding united into one ground of action. It is generally held that this connection may be established by any of the usual methods of transferring title, voluntary or involuntary, and also by the mere informal delivery of possession by mutual consent. There is privity between ancestor and heir, testator and devisee, vendor and vendee, lessor and lessee, judgment debtor and execution purchaser.[50] Privity is not presumed. The burden of proving privity is on the one claiming by adverse possession.[51]

In the absence of formal transfer of title, some difficulty may

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[48] 2 Minn. L. Rev. 137.

[49] 2 Corpus Juris, 84–90; Buswell, Limitation and Adverse Possession, § 239; Wood on Lim., 4 ed., § 271; Ely *v.* Brown, 183 Ill. 575, 597, 56 N. E. 181 (1900); Davock *v.* Nealon, 58 N. J. L. 21, 32 Atl. 675 (1893).

[50] Overfield *v.* Christie, 7 S. & R. (Pa.) 173 (1821); 2 Corpus Juris, 85–90; Ames, Lectures on Legal Hist., 203, 204. In South Carolina tacking is allowed only between ancestor and heir. Lewis *v.* Pope, 86 S. C. 285, 68 S. E. 680 (1910); Mazyck *v.* Wight, 2 Brev. (S. C.) 151, 153 (1807).

[51] Doe *v.* Brown, 4 Ind. 143 (1853); Ryan *v.* Schwartz, 94 Wis. 403, 69 N. W. 178 (1896).

arise in showing any recognized connection to permit tacking possessions. Thus where a widow continues in the possession of land held adversely by her deceased husband, it has been held that the widow is not entitled to tack her husband's possession to her own. It is argued that, since the widow has no right in the land before her dower is assigned, her entry is a new disseisin.[52] Privity is, however, worked out between husband and wife in numerous cases, which hold that the widow's holding, if in subordination to the heirs at law, may be tacked to that of her husband.[53] Although the widow is neither heir, devisee, nor grantee and does not succeed to her deceased husband's inchoate title, yet if she occupies under her dower, quarantine or homestead right, or as guardian of her children, her possession may be tacked to that of her husband so that it will enure to the benefit of the heirs.[54]

The holding of a decedent and his personal representative cannot be tacked unless there is a legal right of possession to administer the decedent's lands.[55] It is, however, held that the possession of real estate by an executor with power of sale may be tacked to that of his testator in establishing title by adverse possession.[56] The possession of the executor or administrator may be deemed a continuance of that of the deceased, where by statute he has the right to take possession of the real estate and actually does so for the benefit of the estate. The continuity of adverse possession is not interrupted by the ordinary lapse of time between the deceased's death and the appointment of an administrator and the taking of possession by him.

It is submitted that there cannot be tacking between testator and devisee under a void will, as there would be no transfer or delivery of possession, and the inchoate possessory title would devolve upon the heir, who would be the only one who could continue the same claim of title, and take advantage of the ancestor's

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[52] Doe *v.* Barnard, 13 Q. B. 945 (1849); Sawyer *v.* Kendall, 10 Cush. (Mass.) 241 (1852); Robinson *v.* Allison, 124 Ala. 325, 27 So. 461 (1899).

[53] Mielke *v.* Dodge, 135 Wis. 388, 393, 115 N. W. 1099 (1908); 14 HARV. L. REV. 149; 17 HARV. L. REV. 277.

[54] Atwell *v.* Shook, 133 N. C. 387, 45 S. E. 777 (1903); Johnson *v.* Johnson, 106 Ark. 9, 152 S. W. 1017 (1912); Jacobs *v.* Williams, 173 N. C. 276, 91 S. E. 951 (1917).

[55] Tennessee Iron Co. *v.* Ferguson, 35 S. W. 900 (Tenn. Chan. App. 1895).

[56] Cannon *v.* Prude, 181 Ala. 629, 62 So. 24 (1913); Vanderbilt *v.* Chapman, 172 N. C. 809, 90 S. E. 993 (1916).

possession.[57] A few courts apparently require continuous formal transfers to make privity, and hold that successive possessions cannot be connected by delivery of more than the tract actually described in deeds between the parties, although more is intended to pass and possession may be actually taken by the grantee.[58] According to the great weight of authority, however, if possession is transferred as to all, including the land outside the limits described, tacking is allowed.[59]

"If each grantee succeeds to the possession of his grantor, there is such privity between the occupants that their several possessions are referred to and regarded as continuous."

It is said that

"the privity required is a continuous possession by mutual consent, so that the possession of the true owner shall not constructively intervene." [60]

The courts have been somewhat put to it for an explanation of the doctrine that an oral agreement and delivery of possession, ordinarily not sufficient to transfer title to land, are sufficient to make "privity of estate." The theory advanced by the Wisconsin court is that privity is purely a question of continuity of physical possession, and has no relation to the transfer of title or claim of title. In *Illinois Steel Co.* v. *Paczocha*[61] the court remarks,

"It is said that there must be privity between the successive occupants, but this does not at all mean that there must be a privity of title. . . . The privity between successive occupants required for the statute of limitations is privity merely of that physical possession, and is not dependent upon any claim, or attempted transfer, of any other interest or title in the land."

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[57] Peoples Water Co. *v.* Anderson, 170 Cal. 683, 151 Pac. 127 (1915); Tuggle *v.* Southern Ry. Co., 204 S. W. 857 (Tenn. 1918).

[58] Evans *v.* Welch, 29 Colo. 355, 68 Pac. 776, 779 (1902); Vicksburg, etc. Ry. Co. *v.* Le Rosen, 52 La. Ann. 192, 203, 26 So. 854 (1899); Messer *v.* Hibernia, etc. Soc., 149 Cal. 122, 124, 84 Pac. 835, 837 (1906); 29 HARV. L. REV. 790.

[59] Rich *v.* Naffziger, 255 Ill. 98, 99 N. E. 341 (1912); Gildea *v.* Warren, 173 Mich. 28; 138 N. W. 232, 233 (1912); Wishart *v.* McKnight, 178 Mass. 356, 59 N. E. 1028 (1901); Bugner *v.* Chicago T. & T. Co., 280 Ill. 620, 637, 117 N. E. 711 (1917); Crawford *v.* Viking Co., 84 Kan. 203; 114 Pac. 240 (1911); 35 L. R. A. (N. S.) 498, note.

[60] Shedd *v.* Alexander, 270 Ill. 117, 126, 110 N. E. 327 (1915); Illinois Steel Co. *v.* Budzisz, 106 Wis. 499, 82 N. W. 534 (1900).

[61] 139 Wis. 23, 28, 35, 119 N. W. 550 (1909).

This theory is believed to be erroneous. Privity of estate means succession to the possessory title. Suppose the adverse possessor, A, has previously sold and conveyed his possessory title to B, who fails to enter, and then delivers possession to C by oral agreement. C enters and holds for the balance of the period. There is privity of physical possession, but not privity of estate between A and C, except as to a new adverse possession which A may have initiated since his grant to B.

Oral tacking is allowed because the inchoate prescriptive title may be transferred by the possessor by mere delivery. If he abandons or conveys to B he has nothing to transfer. But the grantor can hardly set up the possession, which he has abandoned by delivery, as a title in an action of ejectment against his grantee.[62] An oral agreement of transfer would be valid as against third parties at least, even if questionable under the statute of frauds as between the immediate parties to the grant.[63]

In tacking constructive adverse possessions under color of title, it has been held in New York that there must be a regular deed or formal conveyance from holder to holder. It is argued that a void deed will not place the successor in the predecessor's shoes as to such claim of title. "Every adverse possession is a wrong amounting to an inchoate right." To make continuity of estate with the prior constructive adverse possession, it is essential that this inchoate title pass along the line by conveyance, as there is no corporeal seisin which can be transferred by livery.[64] It has, however, been held by certain other courts, that a formal deed under seal is not necessary to tack constructive possessions. If there is some written instrument, and a colorable transfer, so that the latter claimant shall apparently hold by right of the former, this will be sufficient.[65] It is the legislative and judicial policy to favor those claims of title that are evidenced by written instruments of transfer, both as to the period within which they will be quieted and as

[62] Clithero *v.* Fenner, 122 Wis. 356, 99 N. W. 1027 (1904); 18 HARV. L. REV. 62; Innis *v.* Miller, 10 Mart. (La.) 289 (1821).

[63] McNeely *v.* Langan, 22 Ohio St. 32 (1871); Cunningham *v.* Patton, 6 Pa. St. 355, 357 (1847).

[64] Simpson *v.* Downing, 23 Wend. (N. Y.) 315, 316 (1840).

[65] Kendrick *v.* Latham, 25 Fla. 819, 6 So. 871, 875 (1889); Crispen *v.* Hannavan. 50 Mo. 536, 549 (1872); Watts *v.* Parker, 27 Ill. 224 (1862); Barger *v.* Hobbs, 67 Ill. 592, 597 (1873).

to the tangible acts of ownership which will amount to adverse possession. Delivery of actual possession of part of the land held under color of title may well be considered constructive delivery of possession of the entire tract described, even though the deed of conveyance be without a seal or scroll or be otherwise defective. It is the very purpose of the doctrine of adverse possession to cure technical defects in the evidence of title.

The underlying theory of title by adverse possession is put to the acid test by the problem presented when one disseisor or converter, B, has been, in turn, dispossessed by another wrongdoer, C. The question is whether the successive adverse holdings have a different effect on the right of the original owner, A, than where the holdings connect by means of a transfer. A few courts and writers looking at the owner's continuous laches rather than at the possessor's consistent claim of title, have discarded or condemned the requirement of privity for acquiring title by adverse possession. For them it should be enough to show that the owner has been continuously kept out of possession for the statutory period.

Thus Dean Ames, in his well-known essay on the nature of ownership,[66] says,

"C, although a disseisor, and therefore not in privity with B, may tack the time of B's adverse possession to his own to make out the statutory period against A. This tacking is allowed in England, Canada, and in several of our States."[67]

Dean Ames argues that the widespread opinion to the contrary must be deemed erroneous.

"The laches of the original owner who remains continuously dispossessed throughout the statutory period, is the same, and should be

[66] LECTURES ON LEGAL HIST. 204; 3 HARV. L. REV. 318, 321.

[67] He cites the following cases: Doe *v.* Carter, 9 Q. B. 863 (1847); Willis *v.* Howe, [1893] 2 Ch. 545, 553; Kipp *v.* Synod, 33 Up. Can. Q. B. 220 (1873); Fanning *v.* Wilcox, 3 Day (Conn.) 258 (1808); Smith *v.* Chapin, 31 Conn. 530 (1863), (*semble*); Shannon *v.* Kinny, 1 A. K. Marsh. (Ky.) 3 (1817); Hord *v.* Walton, 2 A. K. Marsh. (Ky.) 620 (1820); Wishart *v.* McKnight, 178 Mass. 356, 59 N. E. 1028 (1901); Fitzrandolph *v.* Norman, 2 Tayl. (N. C.) 131 (1817). (Presumption of grant from state though no privity.) Candler *v.* Lunsford, 4 Dev. & B. (N. C.), 407 (1839). (Presumption of grant, though no connection proved.) Davis *v.* McArthur, 78 N. C. 357 (1877); Cowles *v.* Hall, 90 N. C. 330 (1883); 1 DART, VENDOR AND PURCHASER, 6 ed., 464; POLLOCK AND WRIGHT, POSSESSION, 23. See also Salter *v.* Clarke 4 S. R. (N. S. W.) 280, 21 W. N. (N. S. W.) 71 (1904).

attended with the same consequences to him, whether the adverse possession be held continuously by one or several persons, and whether subsequent possessors do or do not stand in privity with their predecessors."

In *Illinois Steel Co.* v. *Budzisz*,[68] Marshall, J., discusses with his usual elaboration the requisites of adverse possession, and declares that the letter of the statute only calls for the disseisin or exclusion of the true owner for twenty years, but by judicial construction the requirement that successive possessions be connected by privity has been super-added. It is commonly said to be the reason for the requirement of privity that the possession of the disseised owner revives between successive disseisins, and the continuity of possession between the adverse claimants is thereby broken.[69] This reason, however, seems unsound and fictitious.[70] The real reason for the requirement, if any, would seem to be that the new entry gives rise to a new right of action against each occupant, rather than that when the first disseisor is interrupted, the interruption, though but for a moment, permits the seisin of the true owner to revest by operation of law.[71] The vital question would seem to be not how long has the owner been out of possession and failed to sue, but, on the other hand, how long has the defendant by himself and his predecessors asserted a consistent claim of title. Privity of estate might, then, be explained as one aspect of the requirement of claim of title, *viz.*, that the holding must be under the same claim of title. In order to be regarded as the same cause of action, it must be connected, consistent, and continuous.

If there is a series of independent holdings, one is no evidence in support of the rightfulness of the others. Each is a different claim of title, and new ground of action. The trespasser cannot go further back for the origin of his title than the day of his entry into possession. It is believed that there is very little authority for dispensing with the requirement of privity, and that the cases cited for this by Dean Ames do not go to the full extent supposed.

In *Doe* v. *Barnard* [72] it is apparently held that you can tack under

[68] 106 Wis. 499, 507, 514, 82 N. W. 534 (1900).

[69] 10 COL. L. REV. 761; 3 VA. L. REV. 637; 2 CORPUS JURIS, 85; Vermont Marble Co. *v.* Eastman, 101 Atl. 151, 164 (Vt.) (1917).

[70] Wishart *v.* McKnight, 178 Mass. 356, 59 N. E. 757 (1901).

[71] Sherin *v.* Brackett, 36 Minn. 152, 13 N. W. 551 (1886); AIGLER'S CASES ON TITLES, 35, note.

[72] 13 Q. B. 945 (1849).

the English statute, 3 & 4 William IV, without privity, so as to use the prior possession as a shield, but not to use it as a sword. The result of that case, and the companion one of *Doe* v. *Carter*,[73] would seem to be that the widow, while in possession, could bring trespass against, or resist ejectment by, the true owner, but being ousted could not sue in ejectment against a stranger, because she was not in privity with the prior possession of her husband, but showed title to his possession to be in her son. Apparently under this theory the rightful owner may be barred, although the last holder has neither acquired the statutory title nor possession good against third parties. The true owner cannot eject the last trespasser in possession, but if the tables are turned the last trespasser cannot eject former owner if put out by him.

In *Groom* v. *Blake* [74] the case of *Doe* v. *Carter* is stated and criticized and the anomaly is pointed out in this doctrine that property should become *quasi-derelict* without a rightful owner under the operation of the statute. If the statute does run against the true owner, it will enure to the benefit of the first rather than of the last or the intermediate trespasser. *Doe* v. *Barnard* is overruled by *Asher* v. *Whitlock* in so far as it holds that a defendant may justify interference with the possession of another by evidence of an outstanding title under which he does not claim.

In *Willis* v. *Earl Howe*[75] Kay, L. J., expressed the opinion that

"a continuous adverse possession for the statutory period, though by a succession of persons not claiming under another, does, in my opinion, bar the true owner."

But in *Dixon* v. *Gayfere*,[76] Romilly, M. R., held that as between successive trespassers the law could not ascribe a title to any one of them, neither to the first nor to the last nor to any intermediate holder, and that the trespassers could not tack possessions which were not continuous.[77] If the statute does run against the true

[73] 9 Q. B. 863 (1847).

[74] 6 Ir. Com. L. Rep. 400, 410 (1857).

[75] [1893] 2 Ch. 545, 553.

[76] 17 Beav. 421, 430 (1853).

[77] See Johnson *v.* Brock, [1907] 2 Ch. 533, 535, 538; LIGHTWOOD, TIME LIMIT ON ACTIONS, 120, 124; BANNING, LIMITATION OF ACTIONS, 3 ed., 87, 88; 1 DART. V. & P., 7 ed., 473, 474; 19 HALSBURY'S LAWS OF ENGLAND, "Limitations on Actions," 158, § 322.

owner without privity, it will enure to the benefit of the first as against the last or the intermediate trespasser.

In some Canadian cases it is said that the occupation of successive trespassers, following each other without interruption, will be sufficient to bar the true owner, although they are not in privity with each other.[78] These cases are probably decided on what is supposed to be the English rule, but there are other Canadian cases holding the other way.

Among the American cases most frequently cited as dispensing with privity are the Kentucky decisions of *Shannon* v. *Kinny*[79] and *Hord* v. *Walton*.[80] In both of these Kentucky cases the first holder yielded possession to the second by virtue of a judgment or decree, so that the second holder had all the title of the first, and more too. These cases are explained on that ground in the case of *Winn* v. *Wilhite*,[81] which recognizes the rule that privity must exist between adverse possessors, for one to acquire the benefit of the occupation of the other, and to prevent a new cause of action from arising.[82]

A Connecticut case frequently cited on this point is that of *Fanning* v. *Wilcox*.[83] That case, also, is a case of recovery of possession in an action of law, which is hardly equivalent to a new disseisin. In *Smith* v. *Chapin* [84] it is said:

"Such continuity and connection may be effected by any conveyance, agreement, or understanding, which has for its object a transfer of the rights of the possessor, or of his possession, and is accompanied by a transfer of possession in fact. Such an agreement to sell and transfer of possession as were set up in this case, if proved, were sufficient."

It is accordingly the law of Connecticut that it is essential that there be privity by conveyance, descent, recovery or delivery of

[78] Robinson *v.* Osborn, per Riddell, J., *obiter*, 27 Ont. L. Rep. 248 (1912); 8 D. L. Rep. 1014, 1021 (1912), learned note by E. D. Armour; Kipp *v.* Synod of Toronto, 33 Up. Can. Rep. 220 (1873); *cf. contra*, Simmons *v.* Shipman, 15 Ont. Rep. 301 (1888); Ryerse *v.* Teeter, 44 Up. Can. Q. B. 8 (1878); Hamel *v.* Ross, 3 D. L. Rep. 860 (1912); (Quebec) Butler *v.* Legaré, 7 Q. L. Rep. 307 (1881). But see Salter *v.* Clarke, 4 S. R. (N. S. W.) 280, (1904).

[79] 1 A. K. Marsh. (Ky.) 3 (1817).

[80] 2 A. K. Marsh. (Ky.) 620 (1820).

[81] 5 J. J. Marsh. (Ky.) 521, 524 (1831).

[82] See also Miniard *v.* Napier, 167 Ky. 208, 180 S. W. 363 (1915).

[83] 3 Day (Conn.) 258 (1808).

[84] 31 Conn. 530 (1863).

possession, in order that one may be the beneficiary of the prior possession of another; and one who does not claim through or under another may not rely on his possession.[85] *Wishart* v. *McKnight* [86] is a leading Massachusetts case holding there may be privity by delivery which would have warranted the finding that the possession of each holder had been really transferred to his grantee, although not included in the description of the deeds. It stands for the proposition that "where possession has been actually and in each instance, transferred by the one in possession to his successor, the owner of the record title is barred."

In North Carolina [87] it was formerly held that privity of estate was not required to be shown between different occupants in order to presume a grant from the state, where land had been in adverse use and occupation for thirty years. This rule has now been changed by statute.[88] In Tennessee the presumption that the state has parted with its title after the statutory period of twenty years' continuous possession is still made without a showing of privity.[89] But successive adverse possessions cannot aid each other under the statute of limitations against a private owner unless they are connected by contract or some form of legal privity. Each subsequent possession not so connected takes a new start unaided by the prior possession.[90]

A discussion of the requirement of privity on principle would seem necessarily to involve the inquiry whether the entry of each successive holder gives rise to a new right of action. For instance, A may have held possession for a few days or years, without a shadow of right, when B, another intruder, expels him and holds for the balance of the statutory period, but not claiming under him. When does the right of action against B, the second disseisor, accrue: at the time that A dispossessed the owner and began to withhold possession from him wrongfully and adversely, or at the time of the entry of B? Is the owner's right of entry against A and B the same cause of action?

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[85] Ferriday *v.* Grosvenor, 86 Conn. 698, 86 Atl. 569 (1913).

[86] 178 Mass. 356, 59 N. E. 757 (1901).

[87] See Davis *v.* McArthur, 78 N. C. 357 (1878); Cowles *v.* Hall, *supra*, 90 N. C. 330 (1884).

[88] May *v.* Manufacturing Co., 164 N. C. 262; 80 S. E. 380 (1913).

[89] Scales *v.* Cockerill, 3 Head (40 Tenn.) 432 (1859).

[90] Ferguson *v.* Prince, 136 Tenn. 543, 190 S. W. 548 (1916).

It is assumed by Dean Ames in his classic article on Disseisin of Chattels, or The Nature of Ownership, as it is later called, that the right of recovery is the same right of action against each successive disseisor, and that B holds possession subject to the same defect as A, with the additional defect of a right of action in A. This is, however, to assume the main question in issue. Actions for the recovery of property are founded, (1) upon the plaintiff's title and consequent right of possession; and (2) upon the defendant's wrongful detention or withholding of possession.[91] In the case of successive trespassers, each entry is to be regarded a fresh and independent wrong. When the first trespasser makes his forced abandonment of the land the right of action against him is gone. A new and entirely distinct cause of action accrues to the owner against each new intruder for the new interference with his right of possession and the independent wrongful act of entry. As the Supreme Court of Michigan said in *Riopelle* v. *Gilman*,[92]

"The right of action against any independent disseisor or intruder must date back only to the origin of his possession; while if one succeeds to another by transfer of title or claim, the right of action goes back to the first occupant in the chain of adverse possession."

As Parker, J., says in *Johnson & Sons* v. *Brock*,[93]

"the old right of action was gone when the first intruder went out, and that a new right of action arose when the fresh intrusion occurred."

When one purchases land from one exercising dominion over it, he buys a title in the process of being quieted and protected by the statute of limitations. A possessory title is thus a growing plant becoming more and more firmly rooted in the soil. No title can grow on this possession if the root is broken by ouster.

If there is privity between the successive occupants, the possession of each is rooted to or engrafted upon the original entry, and may be regarded as an outgrowth of the former possession.[94] On the other hand there seems no reason why B, a trespasser, a casual interloper, who drives A from possession, should get the benefit of

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[91] See LANGDELL, EQUITY PLEADING, §§ 120, 123, 125; CRUISE, DIGEST REAL PROP. Tit. 31, ch. II, § 22.

[92] 23 Mich. 33, per Campbell, J.

[93] [1907] 2 Ch. 533, 535, 538.

[94] Asher *v.* Whitlock, L. R. 1 Q. B. 1 (1865).

the time which has run in favor of the possession held by A. He does not acquire the possessory title of his predecessor. It is not necessary to consider the true owner as restored to constructive possession, as his right of possession continues; and he may be regarded as acquiring a new right of action against B, who by an independent act invades his right, which he should be allowed a new period of twenty years to pursue. But if there is privity, there is a continuation of the disseisin, and the entry of the successor "relates back" to the entry of him whose possessory right he holds.[95] This is for the reason that he succeeds by transfer to a possessory title already partly established. This substitution does not make a new cause of action, and the successive possessions blend into one. So the periods of adverse user of a way may be tacked where there is privity between the successive claimants. The consistent continued adverse user becomes conclusive evidence of right.[96]

If the title of the true owner is extinguished by the possession of independent trespassers, then the last of the trespassers can defend his possession against the true owner, although he may still be ejected by the first trespasser.[97] The statute will thus quiet a title in favor of A, which is not being asserted or exercised by him against the true owner, who has no right of action against A to recover the possession. Why should the possession of a subsequent trespasser enure to the benefit of a prior trespasser who is no longer claiming title?

It may indeed be argued that, even where there is privity a new cause of action accrues against each successive wrongdoer and that the statute of limitations should always begin to run afresh. This would prevent tacking even cases in which there is privity, and it has been so held in England as to chattels, and in South Carolina as to both chattels and land except in case of descent.[98]

[95] Davock *v.* Nealon, 58 N. J. L. 21, 32 Atl. 675 (1895); Sawyer *v.* Kendall, 10 Cush. (Mass.) 241, 244 (1852); Witt *v.* St. Paul & N. P. Ry. Co., 38 Minn. 122, 35 N. W. 862, 865 (1888); Christy *v.* Alford, 17 How. (U. S.), 601 (1854).

[96] McLean *v.* McRae, 50 N. S. R. 536, 33 Dom. L. Rep. 128, 132.

[97] E. D. Armour, "Statute of Limitations as a Conveyancer," 3 CAN. L. TIMES, 521; 1 HAYES, CONV. 268.

[98] Miller *v.* Dell (1891), 1 Q. B. 468 (chattels); Beadle *v.* Hunter, 3 Strob. (S. C.), 331 (1848); King *v.* Smith, Rice Law Rep. (S. C.) 10 (1838); Garrett *v.* Weinberg, 48 S. C. 28, 26 S. E. 3, 18 (1896). See Potts *v.* Gilbert, 3 Cruise Digest, R. P. 447; 3 Wash. C. C. 475 (1819).

It may be admitted that it does not necessarily follow, that because the legislature has said that no action shall be brought against A unless within twenty years after the cause of action accrues, that therefore B cannot be sued in respect to an entry or conversion made by him within twenty years. It may be difficult to show that there is not a new cause of action against B, even though his entry is by consent of A. In the case of chattels it would seem to be a new conversion.[99] Barring a right of action against B is not necessarily the result of a statute barring a right of action against A. But the statute ought to receive "such a construction as will effectuate the beneficent objects which it is intended to accomplish, — the security of titles and the quieting of possessions." [100] Tacking may, if necessary, be explained as a common-law doctrine, a limitation by analogy, because to hold otherwise would be contrary to the policy of the statute and would prevent an adverse holder from transmitting to another the benefit of his prior holding. Where the same claim of title has been consistently asserted for the statutory period by persons in privity with each other, there is the same reason to quiet and establish the title as where one person has held. The same flag has been kept flying for the whole period. It is the same ouster and disseisin. If the statute runs, it quiets a title which has been consistently asserted and exercised as against the true owner, and the possession of the prior holder justly enures to the benefit of the last.

If, on the other hand, the statute runs without privity, then the first holder will have the better title among the successive holders because of his prior possession, though he may have held only a day. The relative priority of the inchoate titles will remain unaffected by the extinguishment of the true owner's right. Title will thus vest successively in the different holders, and only when all the prior holders are barred will the last possessor gain an indefeasible title to the land.[101] It seems unreasonable that either the prior or subsequent independent holders should benefit by each others' adverse possession. As a broad question of legislative policy, however, it may perhaps be advisable to bar stale demands without requiring proof of privity of estate between successive holders.

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[99] Miller *v.* Dell, [1891] 1 Q. B. 468.

[100] Willison *v.* Watkins, 3 Pet. (U. S.) 43, 54 (1830).

[101] DART, VENDOR AND PURCHASER, 7 ed., 475; 2 PRESTON, ABSTRACTS, 293.

Where a statute of limitation requires action to be brought within twenty years, or some other period after the owner or his predecessor shall have been seised or possessed of the premises, a different result may possibly be reached than where the statute runs from the time when the right of action accrues. It was held in Michigan,[102] under such a statute, that a party must bring his action within twenty-five years after his disseisin, whether the persons in possession claimed through or from each other or not. The object of such a statute, it was said, is to compel every party disseised to use some diligence and to bar a right of entry after twenty-five years' practical abandonment of the possession to strangers. This distinction, however, has not been followed in other jurisdictions.

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[102] Riopelle *v.* Gilman, 23 Mich. 33 (1871). See also 5 CAL. L. REV. 429.